

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





77-1133

To be argued by  
James R. McGowan

B  
P/S

No. 77-1133

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,  
Plaintiff-Appellee

v.

LOUIS FI MAIO,  
Defendant-Appellant.

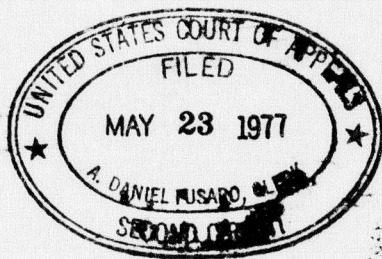
ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE DEFENDANT-APPELLANT

JAMES R. MCGOWAN  
c/o SALTER, MCGOWAN, ARCARO & SWARTZ,  
INCORPORATED  
300 INDUSTRIAL BANK BUILDING  
PROVIDENCE, RI 02903  
(401) 274-0300

AMEDEO C. MEROLLA  
c/o TEMPKIN, MEROLLA & ZURIER  
40 WESTMINSTER STREET  
PROVIDENCE, RI 02903  
(401) 751-2400

ATTORNEYS FOR DEFENDANT



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1133

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LOUIS DiMAIO,

Defendant-Appellant.

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BRIEF FOR THE DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

On July 14, 1976, a Federal Grand Jury sitting in New Haven, Connecticut, returned an indictment (A-5,6) charging Louis DiMaio, in two separate counts, of violating Title 26, United States Code, Section 7206(2), and Title 18, United States Code, Section 371. Count I charged that he "wilfully" aided and assisted in the preparation and presentation to the Internal Revenue Service of a "false and fraudulent" U.S. Information Return (Form 1099) "in that it represented that on April 5, 1976, one John Doe, also known as Edward S.

Smith [Smith was named as a co-defendant] was the recipient of compensation in the amount of \$1,261.80 from payment of a winning pari-mutuel trifecta ticket, serial number 1254480, issued by the Connecticut Yankee Greyhound Racing, Inc., whereas as the said defendants then and there well knew and believed, Dennis L. Kubesh was the recipient of said compensation from payment of said pari-mutuel trifecta ticket". Count II charged a "conspiracy", on or about April 5, 1976, participated in by Louis DiMaio, Edward S. Smith, and Dennis L. Kubesh, to aid and assist in the preparation of the Form 1099 referred to in Count I, and "to defraud the United States of America by impeding, impairing, obstructing and defeating the lawful Governmental functions of the Internal Revenue Service...in the ascertainment, computation, assessment, and collection of the revenue, to wit, income taxes". Count II also alleged that the defendant acted "wilfully" and cited two overt acts, viz.. (1) that on or about April 5, 1976, Louis DiMaio approached Dennis L. Kubesh at the Plainfield Dog Track, and (2) on or about April 5, 1976, Edward S. Smith signed his name "as payee of compensation" in the amount of \$1,261.80 from payment of winning pari-mutuel trifecta ticket serial number 1254480".

The federal District Court judge (Hon. Jon O. Newman) who later heard the case with a jury, interpreted Count II as



as charging a conspiracy to commit the substantive offense under the Internal Revenue Code set out in Count I. (A-98,99,100)

On July 22, 1976, the defendant DiMaio pleaded not guilty.

Trial by jury began on January 17, 1977, and concluded on January 19, 1977. The jury returned a verdict of guilty on both counts against DiMaio.

On February 22, 1977, DiMaio was sentenced to imprisonment for two (2) years on each of Counts I and II, with execution of sentence suspended after six (6) months; he was also placed on probation for three (3) years; the sentences on the two counts were to run concurrently.

The defendant filed a timely notice of appeal; his counsel in the trial court, James R. McGowan, was appointed to represent him as an indigent on this appeal.

#### STATUTES INVOLVED

Title 26, United States Code

Sec. 6041. INFORMATION AT SOURCE:

(a) PAYMENTS OF \$600 OR MORE.

All persons engaged in a trade or business and making payment in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensation, remunerations, emoluments, or other fixed or determinable gains, profits,



and income (other than payments to which section 6042(a)(1), 6044(a)(1), or 6049(a)(1), and other than payments with respect to which a statement is required under the authority of section 6042(a)(2), 6044(a)(2), 6045, 6049(a)(2), or 6049(a)(3), of \$600 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Secretary, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

\* \* \* \*

(d) RECIPIENT TO FURNISH NAME AND ADDRESS.--  
When necessary to make effective the provisions of this section, the name and address of the recipient of income shall be furnished upon demand of the person paying the income.

#### Sec. 7206. FRAUD AND FALSE STATEMENTS.

Any person who--

\* \* \* \*

#### (2) AID OR ASSISTANCE.--

Wilfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of

the person authorized or required to present such return, affidavit, claim, or document;

\* \* \* \*

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Title 18, United States Code

Sec. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES.

If two or more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

STATEMENT OF FACTS

In January, 1976, the Plainfield Greyhound Racetrack began to operate in Plainfield, Connecticut. (A-25)

This new track at its inception, and as of April 5, 1976, did not use the official Internal Revenue Service Form 1099 in reporting payments to bettors of \$600 or more. (A-114)

Instead, it employed a modified, home-made version of the official form that differed from the latter in at least



four respects.

First, this home-made Form 1099 contained bold black-faced lettering on its left side making up the legend "TO WHOM PAID". No such legend appears on the official IRS Form 1099. (A-114)

Second, this home-made Form 1099 was in effect a "receipt" because it contained a line under which appears the words "Signature of payee". No such line appears on the official IRS Form 1099; there is no place provided on the official Form 1099 for "Signature of payee"; the official Form 1099 is a payor's report and not a payee's receipt. (A-114)

Third, the official IRS Form 1099 contains the words "COPY A FOR INTERNAL REVENUE SERVICE CENTER"; no such language appears on this Connecticut track's home-made Form 1099. (A-114)

Fourth, this home-made Form 1099 refers to no instructions about its preparation. The official IRS Form 1099, at its lower right-hand corner, reads: "For instructions on completing this form, see 'Instructions for Form 1096'." (A-114)

On the evening of April 5, 1976, Dennis Kubesh, an Electric Boat Company employee, and three friends went to this Plainfield track; the four contributed to the purchase of a \$126 combination ticket on the third race that won and paid \$1,262.80. (A-34 to 40, incl.)

Kubesh took the winning ticket to a track cashier's window; there he learned that this track before cashing such a ticket insisted on "a driver's license" because its home-made Form 1099, unlike the official IRS Form 1099, did call for such; Kubesh didn't have a driver's license. (A-36,38,39,114)

While Kubesh was at the track cashier's window, a bystander asked him if he wanted to sell the ticket; Kubesh immediately agreed. (A-36,40,41)

Kubesh walked a few feet away from the track cashier's window with the man who had asked him if he wanted to sell the ticket; at this point a second man joined them. (A-36)

This second man didn't say a word to Kubesh, but handed him eleven hundred dollars and change; Kubesh then gave up his ticket. (A-37,38,40,41)

Kubesh exchanged no words at all with the second man who paid him the money; the whole transaction took less than a minute. (A-37,38,40,41)

Kubesh, when called as a prosecution witness in this case, could not identify either of the two men. (A-41, 42, 43)

One Internal Revenue Service Special Agent, Raymond K. Weber, was on surveillance duty at this track on April 5, 1976,



and testified at the trial of this case that after the third race, although he was about forty (40) feet away, "I saw Mr. DiMaio give the money to Kubesh, and then Kubesh, in turn, gave a trifecta ticket to Mr. DiMaio." (Tr. 84-87, 98)<sup>1</sup> In short, Weber identified DiMaio as the non-speaking second man who dealt with Kubesh only by giving Kubesh money, and not as the man who originally spoke to Kubesh.

Weber was the only IRS Special Agent who testified that DiMaio participated in the purchase of this ticket. (Tr. 98, 107)

Just before the ticket purchase, Special Agent Weber saw an unidentified man standing by the track cashier's window; this unidentified man raised his arm and beckoned to DiMaio to come over to Kubesh. (Tr. 101,102)

Special Agent Weber was too far away to overhear any conversation that DiMaio was party to. (Tr. 104,107)

After the ticket purchase, Special Agent Weber followed Kubesh to the kennel club area where Kubesh split up

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<sup>1</sup>Page references preceded by the letter "A" are references to appellant's record appendix pages; such record appendix pages are used instead of transcript page references when the testimony is reproduced in the record appendix. When testimony is not reproduced in such record appendix, transcript page references are given preceded by "Tr.".

some money with other people at a table. (Tr. 107, 108)

After observing this splitup between Kubesh and his friends, Special Agent Weber returned to where he could see DiMaio again. (Tr. 107-109)

Special Agent Weber saw DiMaio speaking to several people thereafter; Weber was too far away to hear any part of such conversations; DiMaio spoke first to a young black man, then to an older black man, and finally after the running of the next (fourth) race DiMaio sat down at a table with two other men. (Tr. 110-116)

Special Agent Weber could overhear no part of any DiMaio conversation partly because of the distance he was from DiMaio, but also because "there's a lot of noise at the track". (Tr. 111, 112, 115, 116, 118, 119, 131)

After a while Special Agent Weber saw DiMaio hand a ticket to the younger of the two men sitting with him at this table. (Tr. 92,116)

Although Weber earlier had been approximately thirty-five to forty feet away from DiMaio, when Weber saw DiMaio purchase a ticket from Kubesh, Weber testified he was able to identify the ticket in question as a trifecta ticket because of its length. (Tr. 87,98,99,120,144,153,156)

Weber's testimony on direct examination fixed



the length of a trifecta ticket as "approximately four inches long"; later, on redirect, his testimony was "approximately five or six inches". (Tr. 87, 156)

Special Agent Weber was approximately twenty feet from the table at which he later saw DiMaio sit down, with two men, to the younger of whom DiMaio subsequently handed a ticket that Weber was also able to identify from its length as a trifecta ticket. (Tr. 115-121, 144)

Although there are three kinds of trifecta tickets, each with a distinctive color, Special Agent Weber could not recall the color of the ticket he saw Kubesh give to DiMaio, or the color of the ticket he later saw DiMaio hand to the younger of the two men at the table, but he believed it was gray. (Tr. 99,100,116,117,119,120,121,122,150,151,154)

Each of the three different kinds of trifecta tickets in use at this Connecticut track on the night of April 5, 1976, had a distinctive color; the \$126 trifecta ticket that Kubesh had bought on the night of April 5, 1976, had a "green" color. (Tr. 264-269; Ex. 509)

The younger of the two men sitting at the table with DiMaio, to whom DiMaio handed a ticket, was a man whose true name was Donald Collins, Jr., but who was also known to some,



including track cashier Walsh, by the name of Ed Smith; Walsh had cashed a number of tickets presented by Donald Collins, Jr. using the name and identification of Ed Smith; and because he knew Smith (or Collins) so well, Walsh did not require him to fill out all the detail required on the track's home-made Form 1099. (Tr. 62-66,89-92)

Special Agent Weber saw Smith (or Collins) get up from the table and came some fifty (50) feet away, at Walsh's window a ticket that Weber concluded was the same ticket received by Smith (or Collins) from DiMaio. (Tr. 92,113-132)

Special Agent Weber next saw Smith (or Collins) then return to the table where DiMaio was still sitting; at this point there was an exchange of currency between the two men, but Weber was too far away to determine the denominations of the bills being exchanged. (Tr. 113-132)

Another Special Agent, William Smith, was also on duty at this track on the night of April 5, 1976; although he saw DiMaio sitting at the table with Smith (or Collins), and also saw a subsequent currency exchange between them, after Smith (or Collins) went to a track cashier's window, he did not see DiMaio hand any ticket to Smith (or Collins). (Tr. 159-165)



Another Special Agent John J. Dahill, was also on duty at this track on the night of April 5, 1976; he did not see DiMaio purchase a ticket from Kubesh, and he didn't see any exchange of money between DiMaio and Smith (or Collins). (Tr. 200,201,232)

Special Agent Dahill did not see Ronald Brochu in the company of DiMaio on the night of April 5, 1976. (Tr. 233)

Special Agent Weber also did not see Ronald Brochu in the company of DiMaio on the night of April 5, 1976. (Tr. 320)

## ARGUMENT

### I

The prosecution failed in its burden of proof; the District Court should have granted defendant's motion for acquittal.

Both counts of this indictment refer to the defendant's "willful" conduct. In this context of an Internal Revenue Code offense, "willful" means "the intentional violation of a known legal duty". United States v. Pomponio, 97 S.Ct. 22 (1976). In Pomponio the Supreme Court was concerned with "willfully" in Section 7206(1) of the Internal Revenue Code, but the opinion indicates its definition of "wilfully" applies generally to tax felonies and misdemeanors. Count I of the present indictment is a felony under Section 7206(2), of which "wilfullness" is an essential element. The District Court construed Count II of the present indictment as charging a conspiracy to commit the substantive offense set out in Count I. Count I and Count II each charge that the defendant DiMaio acted "wilfully".

What was the "legal duty", if any, of the defendant, DiMaio, with respect to reporting on Form 1099 facts about a winning ticket that the prosecution says he, the defendant, bought from Kubesh. The primary statutory "legal duty" of reporting to the IRS is upon the payor-track. Sec. 6041(a), I.R.C. of 1954. DiMaio owed no legal duty of reporting to the track, or to the IRS, unless the payor-track made a "demand" on him for information, which from this record it clearly did not make on DiMaio. Sec. 6041(d), I.R.C. of 1954.



DiMaio clearly owed no legal duty to report to the track or to the IRS anything about this ticket before he bought it from Kubesh. No one has an obligation to report to a track, or to the IRS, concerning a winning racetrack ticket with which he has no connection. What, then, became DiMaio's "legal duty" after he purchased this ticket from Kubesh. The nature and extent of that duty, even whether there was any duty, would depend upon the facts that, in this criminal case, it was the prosecution's burden to prove.

Two things are clear. First, DiMaio subsequently made no representation himself, directly or indirectly, either to the track or to the IRS, concerning this ticket; the ticket was cashed by Collins; it was he, and he alone, who made whatever representations were subsequently made directly to the track and indirectly to the IRS in the course of preparing Form 1099 (Exhibit 1). Second, the defendant did not testify in this case; Collins did not testify in this case; and none of the Internal Revenue Service Agents who did testify overheard any part of any conversation between DiMaio and Collins.

Yet what went on between DiMaio and Collins is important in attempting to define the nature and scope of DiMaio's "legal duty", if one existed, with respect to aiding and assisting this Connecticut track in executing Form 1099 concerning this winning ticket.

Set out below are three possible situations, all of which are consistent with the record in this case and also with DiMaio's innocence, that is, consistent with the absence of any criminal responsibility on his part for what appeared on this Form 1099 (Exhibit 1).

Situation No. 1

DiMaio did indeed buy this ticket from Kubesh. This was not a criminal act, as the District Judge himself conceded. (Tr. 366) It is not a federal crime of any degree to buy - or sell - a winning racetrack ticket, either before or after a race has been run. Nothing is a federal crime that is not declared to be such by a federal statute; and such statutes are, of course, subject to the rule of strict construction. United States v. Hudson and Goodwin, 7 Cranch 32 (1812); United States v. Wiltberger, 5 Wheaton 76, 95 (1820). After buying this ticket from Kubesh, DiMaio in turn sold it outright to Collins who cashed it. In this factual situation defendant DiMaio did not assist or aid in the preparation of a false Form 1099, and would have had no "legal duty" or occasion of reporting to the track or to the IRS the identify of the original winner of this ticket when Collins later cashed it.



### Situation No. 2

DiMaio did indeed buy this ticket from Kub but as agent for Collins using money provided by the latter. In this situation DiMaio did not aid or assist in the preparation of a false Form 1099, and would have had no "legal duty" or occasion of reporting to the track or to the IRS the name of the original winner of the ticket when Collins later cashed it.

### Situation No. 3

The defendant DiMaio was in a partnership or joint venture with Collins when he bought this ticket from Kubesh, using some of his own money and some provided by Collins. Collins, as one of the partners, later cashed the ticket. Again, defendant DiMaio would not be criminally liable for what his partner subsequently said, or did, in the absence of evidence that he himself knowingly promoted or participated in some wrongdoing. Although one partner or joint venturer may be civilly liable for another partner's acts, criminal liability depends on proved individual wrongdoing. Cf. Morissette v. United States, 342 U.S. 246, 250-263 (1952).

By way of summary, the government's evidence failed to prove the nature of the relationship between the defendant

and Collins. To repeat, defendant DiMaio did not testify in this case; Collins did not testify; and no part of any conversation between Collins and the defendant DiMaio was overheard by any of the IRS agents who did testify in this case.

It was therefore pure speculation, on the record made in this case, that defendant DiMaio acted "willfully", that is, had "committed an intentional violation of a known legal duty" with respect to the subsequent filling out of this Form 1099 (Exhibit 1) by a track employee, Walsh, who dealt solely with Collins. Evidence beyond a reasonable doubt of defendant DiMaio's "wilfulness" was lacking with respect to each of the two counts in this indictment.



## II

The District Court mistakenly assumed that the Form 1099 in question was necessarily false and fraudulent, as a matter of law, unless it reflected the name or names of the original "winner" or winners on this ticket.

The District Court in denying defendant's motion for acquittal cited several cases which it apparently mistakenly interpreted as holding that a Form 1099 prepared at any racetrack in the country should necessarily reflect the name of the original "winner" or "winners" on a ticket. (A-85,86; 344, 345).<sup>2</sup> United States v. Kessler, 449 F.2d 1315 (C.A. 2, 1971); United States v. Haimovitz, 404 F.2d 38 (C.A. 2, 1968); United States v. Maistrow, 451 F.2d 1342 (C.A. 2, 1971); United States v. Lincoln, 472 F.2d 1183 (C.A. 5, 1973). These cases, later hereinafter discussed, stand for no such general legal proposition. They turn rather on their special facts, viz. that where a particular track has set up a "winner verification" procedure (presumably with the knowledge and concurrence of local Internal Revenue Service people) a Form 1099 that does not contain the name of the original "winner" or "winners" sought by such "winner verification" procedure or form, is indeed false and fraudulent.

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<sup>2</sup>See also the District Court's charge. (A-96; Tr. 359)

In the instant case, however, we are dealing with a newly opened Connecticut track, opened in January of 1976, which by April 5, 1976, the only relevant date mentioned in this indictment, had no such "winner verification" procedure in place. (Tr. 21, 27-30, 51-55). In fact, this track as of April 5, 1976, was using a home-made Form 1099 (Exhibit 1) which differed significantly, and misleadingly, from the official Form 1099 (Exhibit 501) approved by the Internal Revenue Service. (A-114)

First, this home-made Form 1099 did not ask for the name of the "winner" or "winners" on a ticket; rather, in black bold-face type, it asked for the name of "TO WHOM PAID", words wholly missing from the official Form 1099. (Exhibits 1, 501; A. 114) In short, this newly opened Connecticut track on April 5, 1976, sought the name only of whoever presented a ticket to its track cashier, whether or not such presenter was the original "winner", or sole winner on the ticket in question. (Tr. 53-55)

Second, this home-made Form 1099 was actually a signed "receipt", providing a place for the signature of the one person who presented the ticket for payment. (Exhibit 1).



The official Form 1099 contains no place for the signature of any person; it is a report, or a return, by a payor, not a "receipt" by the other party to a payment transaction acknowledging the receipt of money in hand.

Third, this home-made Form 1099 contains no reference to instructions, that might have put a track patron on notice as to what was required (e.g. the identity of the "winner" or "winners"). (Exhibit 1). The official Form 1099 does direct the reader, at its lower right-hand corner, to: "For instructions on completing this form, see 'Instructions for Form 1096'", but this Connecticut track's home-made Form 1099 contained no such notice.

In Kessler (as in Haimovitz) the New York track in question apparently used a "winner" verification procedure that this newly opened Connecticut track, involved in the instant case, did not adopt until July of 1976, several months after the date of the alleged crime set out in the instant indictment. Kessler and a co-defendant Stransky were "agents" at a New York track for winners; they would take the latter's tickets and for a later-paid commission cash them, falsely representing themselves to the track as both the "owner" of the ticket and the "winner" of the ticket. The Court dealt as follows with Stransky's arguments:

"Stransky's arguments for reversal are likewise without merit. He first suggests that his submission on February 22, 1965, of a verification slip naming himself as the owner of a twin double ticket entitled to winnings of \$127,552.70 was proper because he had a partial interest in the ticket and because the form left room for only one signature. The suggestion, which is similar to that rejected in United States v. Haimowitz, 404 F.2d 38 (2d Cir. 1968), borders on the frivolous. There was ample evidence that he had no ownership interest in the ticket and that he received a commission for falsely representing himself to be the owner instead of revealing the names of the real winners, which the verification slips sought to elicit for the purposes of Form 1099." (Emphasis supplied.)

In the instant case, this Connecticut track did not require any person cashing a winning ticket to "verify" who the "winner", or "winners" were, at least as of April 5, 1976, the date of this indictment.

In Haimovitz the government convicted the original winners of various tickets who gave them to others to cash, paying the latter a 2-1/2%, or 3%, commission. (Haimovitz might be more in point if here the government's witness Kubesh were the defendant.) The New York track in that case was, from the opinion, clearly using a winner "verification" procedure that this new Connecticut track involved in the instant case did not begin to use until approximately July 1976, several months after the date of the act alleged in the



instant indictment.

The instant case involves a ticket cashed by this newly opened Connecticut track several months earlier, on April 5, 1976; at such earlier date this new Connecticut track was not interested in "verifying" the name of any "winner", or "winners"; in fact it was then using an affirmatively misleading home-made form that permitted only insertion of a single name after "TO WHOM PAID".

In United States v. Maistrow, 451 F.2d 1342 (C.A. 2, 1971) the "winners" of a ticket "hired" others who for a fee misrepresented themselves to the track as the "owners" and "winners" on a "verification form" (presumably the same kind of "verification form" that the Connecticut track in the instant case belatedly adopted several months after the relevant events of this case.) There was no issue in Maistrow of an affirmatively misleading home-made form in use by the track as of the date of the alleged crimes.

In United States v. Lincoln, 472 F.2d 1183 (C.A. 5, 1973), the track printed its own Form 1099 "identical to the official forms except for the addition of a few blanks". The defendant on appeal argued that the evidence failed to conform to the allegations in the indictment, which apparently referred

to "official" forms. The appellate court held, however, that the evidence was not materially at variance with the indictment language. This Lincoln case does not address the prosecution's serious "failure of proof" on the "wilfulness" issue present in the instant case. In Lincoln the court's opinion is clear that the prosecution there had established "the proof of falsification of non-official forms" by the defendant. The defendant on appeal there was merely raising a pleading argument, purely and simply. In the instant case defendant is not arguing about some variance between pleadings and proof. He is arguing that here there was no "falsification" of any form, official or non-official, attributable to him, the defendant DiMaio.

The defendant's legal position in the instant case should not be confused or identified with the position adopted by the District Court in the criticized case of United States v. Blumberg, 258 F.Supp. 885 (D.Del., 1966). There is a superficial similarity only. The Blumberg case presented the case of a classic "ten percenter", that is, one with no ownership interest in the ticket he was cashing as agent for another (an undisclosed principal) in return for a commission. The defendant in Blumberg was acquitted because the District Court



there found the form in use by the track "fatally ambiguous", that is, it was unclear, according to the District Court, whether the track there was interested only in the name of the person to whom the track paid money, or in the name of the original "winner". The Blumberg case has been properly subjected to criticism by other courts because the "verification" form there in use quite plainly put that track's (Brandywine Raceway) patrons on notice that that track did seek the names of ticket "winners". The District Court's opinion in Blumberg even quotes the following extract from the form in use at this Brandywine Raceway:

"The U. S. Government now requires that we report the name and address of all winners of \$600 or more...." (Emphasis supplied.)

In Blumberg the government argued, but unsuccessfully, that such reference to "winners" was calculated to warn any reasonable person that that track wanted the names of "winners"; the courts that criticize Blumberg doubtless agree with this argument of the government. The distinction between Blumberg and the instant case is plain. This newly opened Connecticut track, as of the date mentioned in this indictment, employed no form indicating any interest on the part of this track in the identity of ticket "winners". Moreover, unlike Blumberg, there



is no evidence that the defendant DiMaio had cashed numerous (or any) tickets at other tracks where different procedures might have been brought to his attention. Additionally, it seems plain from the opinion that in Blumberg the track was using a "winner verification" or "winner identification" procedure similar to that described in the Haimovitz and Kessler cases--which this Connecticut track did not adopt until several months after the date of the incident mentioned in Counts I and II of the instant indictment.

In this case the defendant placed in evidence the official IRS instructions for filling out Form 1099. (A-115, 116,117; Exhibit 502) They do not indicate that only the name of the original "winner" or "winners" on a racetrack ticket must be shown on Form 1099. They in fact indicate that a person, not the "actual owner" of all the income in question, may quite properly have his name appear on Form 1099. The opening paragraph (A-115) reads:

"A nominee's return (or returns) on the appropriate form of the 1087 series should be filed with Internal Revenue... by any recipient, whose taxpayer identifying number appears on a form of the 1099... series or equivalent statement for a payment, but who is not the actual owner of the entire payment amount reported."



These instructions conclude with apparently non-obligatory advice that a "nominal or record recipient" should thereafter file another form, Form 1087, identifying "the actual income recipients...even though the law does not require such filing". (A-117) This Form 1087 is to be filed "on or before February 28, 1977", a date subsequent to the indictment and trial of DiMaio. (A-115)

There was no evidence that DiMaio or even the employees of this Connecticut track had ever been told about these ambiguous official instructions. (A-30,31,115-117) Yet the following inference may be drawn from such instructions: only where the IRS, or a track itself, has installed at a particular track a "winner verification" or "winner identification" procedure supplementing such ambiguous official instructions, may falsity be automatically attributed to a Form 1099 by virtue of its omission of the name or names of the original "winner" or "winners" of a racetrack ticket.

### III

The defendant's conviction should be reversed because of the government's failure to produce Brady material.

In a pretrial motion defendant DiMaio's attorney asked for the production of Brady material. See REQUEST FOR DISCOVERY AND INSPECTION, par. 9. (A-78) Thereafter, the government attorney certified that he had "complied with the discovery requirements as put forth in the local rules". (A-13) Indeed, Local Rule 4.A.8. specifically provided for the production of Brady material. Set out below is the pertinent language of Local Rule 4.A.8.

"A. DISCLOSURE BY THE GOVERNMENT

At arraignment, or within 7 days of a request by the defendant when such a request is necessary under Paragraphs 3-7 to obligate disclosure, the Government shall furnish copies, or notify the defendant he may inspect or listen to and record items which cannot be copied, of the following items, in the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the attorney for the government and which are material to the preparation of the defense:

\* \* \* \*

8. Brady v. Maryland, 373 U.S. 83 (1963), Material. All evidence which may be favorable to the accused on the issue of guilt or innocence within the scope of Brady v. Maryland, 373 U.S. 83 (1963)."



It is plain to counsel for defendant DiMaio that the government did not comply with its serious Brady obligation. Subsequent to the trial of the DiMaio case, a somewhat similar case was tried in the Federal District Court of Connecticut, in which counsel for DiMaio was also counsel for the defendants. This subsequently tried case is entitled United States v. Joseph O. Schettini et al, Criminal No. N-76-96. In that subsequently tried case, the mutuel manager at this Plainfield track, Allen B. Rapp, who had testified in the DiMaio case as a government witness, also testified again. At this later trial, Rapp's testimony was that the Plainfield track did not have a "winner verification" or "winner identification" procedure until approximately July of 1976. He testified that in approximately July of 1976, this newly opened Connecticut track adopted a "winner verification" or "winner identification" procedure consisting mainly of the filling out of a form (hereinafter set out) as a preliminary to the filling out of this track's home-made Form 1099. Another government witness in this later tried case, track cashier Luke Parker, testified that before approximately July of 1976 this newly opened Connecticut track was not interested in obtaining the name or names of the original "winner" or "winners" on a ticket, but was only

interested in the name of the one person to whom it paid money on a winning ticket.

Immediately following is a copy of this winner verification or winner identification form first adopted by this Connecticut track about July of 1976.



Winner Verification Or Winner  
Identification Form Instituted  
By The Connecticut Track  
Approximately In July of 1976  
(Exhibit A in United States v.  
Schettini)

| Ticket No.                   | Serial No. | Connecticut Yankee Greyhound<br>Racing, Inc.<br>Plainfield, Connecticut |
|------------------------------|------------|-------------------------------------------------------------------------|
| .....                        | .....      | No. _____                                                               |
| .....                        | .....      | Date _____                                                              |
| .....                        | .....      |                                                                         |
| Method of Identification     |            | Received of Connecticut Yankee                                          |
| <u>Drivers License:</u>      |            | Greyhound Racing, Inc. the sum                                          |
| State: _____                 |            | of \$ _____ in payment                                                  |
| License No. _____            |            | for _____ winning                                                       |
| <u>SOCIAL SECURITY CARD:</u> |            | tickets on combination _____                                            |
| No. _____                    |            | _____ each paying \$ _____                                              |
| Credit Card:                 |            | on the Race No. _____ on _____ date                                     |
| Type of Card _____           |            | Name _____                                                              |
| No. of Card _____            |            | Address _____                                                           |
| Other Identification         |            | _____                                                                   |
| _____                        |            | Telephone No. _____                                                     |

This information is meant to identify the actual winner and is to be furnished to the Internal Revenue Service for determination of income tax liability. Any misrepresentation or false statement made herein is a violation of title 18 and title 26 of the U.S. Code both of which carry substantial criminal penalties.

Signature \_\_\_\_\_

By \_\_\_\_\_

COSR License # \_\_\_\_\_

Window # \_\_\_\_\_

FOR PAYMENT PRESENT THIS COPY TOGETHER WITH TICKETS TO CASHIER

In other words, about July of 1976 this Connecticut track instituted a "winner verification" or "winner identification" procedure similar to that described in the Kessler, Haimc Maistrow, and Blumberg opinions.

The Court of Appeals should note the language in the middle of this "winner verification" or "winner identification" form, adopted about July of 1976:

"This information is meant to identify the actual winner and is to be furnished to the Internal Revenue Service for determination of income tax liability. Any misrepresentation or false statement made herein is a violation of title 18 and title 26 of the U.S. Code both of which carry substantial criminal penalties."

No reasonable person could read such language without concluding that the Internal Revenue Service was, directly or indirectly, largely responsible for this new form; no reasonable person could read such language without also concluding that the inspiration for this new form was a dawning perception by the Internal Revenue Service or by those responsible for the management of this Connecticut track, that the latter's home-made Form 1099 solely in use before July, 1976, was--if not positively misleading--a defective and inadequate device for eliciting from track patrons the name or names of the original "winner" or "winners"



on tickets presented for cashing before July of 1976.

The instant DiMaio record shows the presence of several Internal Revenue agents at this track, before July of 1976, as well as their use and handling of this track's home-made Form 1099's in use before that month. (Tr. 214-221; Exhibits 4,5) By the time this DiMaio case was tried, in January of 1977, the Internal Revenue Service must have been aware of the installation of this "winner verification" or "winner identification" procedure some six months earlier by this Connecticut track. Yet the Internal Revenue Service and the Justice Department did not bring to the attention of the defendant for his use in the instant case information about this change, pregnant as it was with an inference supporting DiMaio's lack of "wilfulness" on the evening of April 5, 1976. Rather, the Internal Revenue Service and the Justice Department allowed the trial judge to labor under the misapprehension that this case, where all relevant events occurred on April 5, 1976, was quite similar to other "ten percenter" cases involving incidents at other tracks that had "winner verification" or "winner identification" procedures in place, on the relevant dates, similar to what this Connecticut track adopted about July of 1976. Also, the Internal Revenue Service and the

Justice Department allowed the jury to infer that failure on DiMaio's part to include the name of Kubesh on this track's home-made Form 1099, on the evening of April 5, 1976, was the equivalent of DiMaio's supplying false and fraudulent information to the Internal Revenue Service.

This Brady argument of course presents no question of attributing some personal bad faith or negligence or delinquency on the part of the assistant United States Attorney who actually tried this DiMaio case, or on the part of the individual Special Agents of the Internal Revenue Service who actually assisted him and were his witnesses. Cf. Brady v. Maryland, 373 U.S. 83, 86-88 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Deutsch, 475 F.2d 55, 57 (C.A.D.C., 1973); United States v. Bennett, 460 F.2d 872, 877 (C.A.D.C. 1972). The relevant consideration is that the United States government, considered as one entity, put DiMaio to trial on criminal charges without disclosing to his attorney, who had requested it, information available to the government and materially helpful in DiMaio's defense against such charges.



IV

The District Court committed error in failing to instruct the jury concerning the defense theories for which there was foundation in the evidence.

A criminal defendant is entitled to have instructions presented by the trial judge relative to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that defense may be in the trial judge's opinion. United States v. O'Connor, 237 F.2d 466, 474, footnote 8 (C.A. 2, 1956); Strauss v. United States, 376 F.2d 416, 419 (C.A. 5, 1967); United States v. Indian Trailer Corporation, 226 F.2d 595, 598 (C.A. 7, 1955); Tatum v. United States, 88 U.S. App. D.C. 386, 190 F.2d 612, 617 (C.A.D.C. 1951); Marson v. United States, 203 F.2d 904, 912 (C.A. 6, 1953).

In this case the defendant had more than one theory of defense; the district Court presented to the jury none of them.

First, in paragraphs 12 through 18 of DEFENDANT'S REQUEST TO CHARGE (A-120,121) defendant set out the defense that the form allegedly falsified by DiMaio was not an officially authorized form approved by the Commissioner of Internal Revenue, but a private, home-made document devised by this newly opened Connecticut track. Cf. United States v. Levy,

533 F.2d 969 (C.A. 5, 1976). There was ample evidence to support this theory. (A-114; Tr. 38-44)

Second, in paragraphs 19 through 22 of DEFENDANT'S REQUEST TO CHARGE (A-122,123) defendant set out the defense that he must be acquitted unless the jury found the defendant had and knew he had a "legal duty" to see to it that the name of Dennis L. Kubesh should have appeared on Form 1099. These paragraphs reflect the recent Supreme Court case of United States v. Pomponio, 97 S.Ct. 22 (1976). The District Court apparently concluded that the Supreme Court opinion in Pomponio was not worth a careful reading. (A-78,79,80)

Third, in paragraph 23 of DEFENDANT'S REQUEST TO CHARGE (A-123), defendant presented the defense that under the official IRS instructions for filling out Form 1099 (there being no winner-verification procedure in place at this Connecticut track on April 5, 1976) there was no requirement on DiMaio or anyone else to set out the name of the original "winner" or "winners" of a winning racetrack ticket on Form 1099, unless such "winner" or "winners" actually cashed such ticket. See in this connection the preceding discussion in Part II of this brief, at pages 25 and 26.

The defendant's counsel made timely objection to the District Court's refusal to charge concerning these



defense theories. (A-109-113)

V

The District Court committed reversible error in allowing the prosecutor to present the testimony of Ronald J. Brochu.

The name of Ronald J. Brochu does not appear in either of the two counts of this indictment. (A-5,6) He had absolutely nothing to do with the one incident referred to in these two counts. His name also did not appear among the government's list of witnesses submitted to the defendant's attorney pursuant to his pre-trial motion, in accordance with local rule 4.A.7. (A-8,9,11,12,13) Cf. United States v. Cannone, 528 F.2d 296 (C.A. 2, 1976)

Yet on the eve of trial, months after the government had submitted its list of witnesses (which it never bothered to amend), the District Court allowed the prosecutor to present the testimony of Ronald J. Brochu concerning allegedly similar prior and subsequent acts in which DiMaio allegedly had participated. It is a measure of the District Court's continuing partiality toward the prosecution in this case that it never inquired of the prosecutor why he delayed so long in

bringing up the name of Brochu, as one of his witnesses, while simultaneously demanding an explanation from defense counsel why he considered Brochu's testimony potentially surprising or prejudicial to the defense. (A-14 to 21) The District Court seemed to proceed on the basis that since the defendant's counsel who actually tried this case (James R. McGowan) was a recent replacement for a previous defense attorney (Amedeo C. Merolla) who had become physically disabled, all prosecution witnesses would be equally strange to him and consequently there would be no surprise prejudicing the defense in the addition of Brochu's name to the prosecution's list of witnesses. (A-16-20) This odd reasoning ignores the obvious fact that new counsel coming late into a case, on the eve of a trial, is necessarily wholly dependent upon his predecessor for knowledge about the case, and defense preparation plans, and that a last-minute addition to the prosecutor's list of witnesses is equally harmful to the defense whether or not new counsel has entered an appearance.

Although the District Court at first sustained the defendant's objection to Brochu as a witness, it shortly thereafter came to a different result, citing the cross-examination by defendant's counsel of the prosecution witnesses, principally IRS Special Agent Weber. (A-23,24,45-53) Clearly



defendant's counsel had not only the right but the obligation to cross-examine closely Weber and other IRS agents and prosecution witnesses, concerning what they saw, and had the ability to see and observe, on the night of April 5, 1976. Yet the District Court saw fit, in effect, to attach a penalty to the exercise of this right and obligation, viz. it would now allow the prosecution to prove through Brochu other prior and subsequent similar acts. The District Court apparently thought that since the defendant's cross-examination disputed or sought to bring into question the government's evidence identifying DiMaio as the purchaser of Kubesh's ticket (only one witness, IRS Special Agent Weber, testified that he could identify DiMaio as the purchaser), this justified allowing in Brochu's testimony about prior and subsequent similar acts in which DiMaio allegedly participated. The following transcript excerpts reflect the reasoning of the District Court:

"THE COURT: Well, I think we ought to, since it may bear on scheduling, explore this matter of other similar acts, because there now has been cross-examination which seems to me to be designed to persuade the jury that they ought not to draw the inference that the defendant was involved in the purchase of anybody else's trifecta ticket, and if you are disputing that that's the inference the jury ought to draw, it



would seem the government is then entitled to evidence of other similar transactions that would tend to prove that in fact this was that very type of transaction." (A-45)

\* \* \* \*

"THE COURT: ...Apparently, from your cross, you're disputing whether on that evening Mr. DiMaio is the person who was engaged in a transaction to buy a trifecta ticket." (A-46)

\* \* \* \*

"MR. McGOWAN: Your Honor, Mr. Hartmere isn't talking about prior similar acts, he's talking about subsequent similar acts.

THE COURT: Well, there is law as to both, prior and subsequent.

MR. McGOWAN: Could I--may I ask the Court for the citation of the Second Circuit opinion which discusses this?

THE COURT: I don't think I need to do legal research on this." (A-48)

\* \* \* \*

"MR. McGOWAN: Mr. Hartmere's not going to limit it to the prior situation, I understand.

THE COURT: He wants to offer prior and subsequent acts to show that in fact Mr. DiMaio was involved in transactions to purchase other people's trifecta tickets.

MR. McGOWAN: Which is exactly what's prejudicial about it. Because the inference is if he did it previously, then it's more likely that he did it subsequently and that's the wrong inference for the jury to draw.

THE COURT: I disagree with you saying that's the wrong inference." (A-49)

\* \* \* \*



"THE COURT: It's simply--it's corroborative that Mr. DiMaio is involved in having people take other people's trifecta tickets and negotiating them and signing the 1099 as it was their winnings?

MR. HARTMERE: That's right. And that they derived income from it." (A-60)

The District Court should not have allowed in Brochu's testimony as relevant, that is, as probative of a conclusion that it probably was DiMaio who purchased this ticket from Kubesh on the night of April 5, 1976, and of a further conclusion that DiMaio intended to falsify the Form 1099 in question. There was simply no connection between incidents involving Brochu and the one incident concerning Kubesh.

The District Court did not properly discharge its duty--even if Brochu's testimony was to some limited extent relevant--of first balancing the probative value of such Brochu evidence against its prejudicial effect. Indeed, the District Court heard nothing, beyond a brief generalized statement from the Assistant U.S. Attorney, concerning Brochu or his testimony, before concluding that the probative value of such evidence outweighed its prejudicial effect. (A-14, 15,

59, 60) Counsel for DiMaio submit that no such conclusion was possible, unless:

- (1) The District Court first heard Brochu's testimony, with the jury absent; or, alternatively
- (2) The District Court had at least thoroughly explored, by questioning the prosecutor, "the convincingness of the evidence that the other crimes were committed".

See in this connection United States v. Bozza, 365 F.2d 206, 213 (C.A. 2, 1966).

In short the District Court could not properly have balanced the probative value of Brochu's testimony against its prejudicial effect, unless it first heard such evidence, or otherwise first determined the pros and cons of its "convincingness". United States v. Bozza, supra.

Brochu's testimony, when later subjected to cross-examination, reveals its own lack of "convincingness" that the District Court would and should have discovered if the District Court had first properly "balanced" the relevant factors before deciding favorably for the prosecution on the issue of the admissibility of Brochu's testimony.



First, Brochu was concerned with saving himself; he had by his own admission cashed tickets for a number of people and was therefore concerned, after talking to his wife, and his lawyer, that the government might charge him with either additional income or income taxes of \$28,000. (Tr. 303-305, 309-311)

Second, Brochu, when first interrogated by the Internal Revenue Service, told them that whatever racetrack tickets he signed represented his winnings; he testified later this was a lie he felt he had to tell in order to help his family. (Tr. 299)

Third, the government took the initiative in speaking to Brochu; the government prosecutor in fact promised him immunity when he was inside the grand jury room, assuring him "your're not going to be in any trouble as far as being a defendant yourself". (Tr. 300, 301, 302, 308)

Fourth, Brochu's testimony was thoroughly confusing as to whether he cashed tickets for "Arthur" or for Louie [DiMaio]. (Tr. 279-281)

Fifth, at one point before the grand jury Brochu said he had obtained money from Louie [DiMaio] only "one time". (Tr. 303)

Sixth, Brochu admitted to prior convictions for crimes involving personal dishonesty, viz. breaking and entering in the nighttime with intent to commit larceny, and forging a check. (Tr. 276,292,293,295,296)

Seventh, the testimony of the IRS Special Agents in this case by itself tends strongly to establish the likelihood of Brochu's perjury, or at least his testimonial recklessness. Brochu, testifying in the federal district court on Tuesday, January 18, 1977, testified on direct examination that he had cashed two tickets on April 5, 1976, and filled out the corresponding Forms 1099, and then turned the proceeds over to Louis DiMaio, one of them just after the third race, and one after the sixth. (Tr. 283,284,306, 307,311-313) These two Forms 1099, dated April 5, 1976, are part of Exhibit **4**. The Court of Appeals should note that this date of April 5, 1976, is also the date of the one incident alleged by both counts of the instant indictment as having been participated in by the defendant DiMaio, and Kubesh, and Smith (or Collins). This question suggests itself: if Brochu cashed two tickets for DiMaio on the night of April 5, 1976, would not some one of these three IRS Special Agents, who testified they had DiMaio under surveillance that night,



have at some time noticed Brochu in the company of DiMaio? Special Agent Dahill, who testified he had DiMaio under surveillance for at least a portion of that night, admitted on cross-examination he had not seen Brochu in DiMaio's company at any time on that evening. (Tr. 232,233) Special Agent Weber, who testified he had DiMaio under surveillance until approximately the end of the fifth race, that is, until approximately 9:00 P.M. or 9:30 P.M., on April 5, 1976, also admitted on cross-examination he did not see Brochu in DiMaio's company at any time that evening. (Tr. 318-320) Special Agent Smith did not testify to having seen Brochu in DiMaio's company on that night. (Tr. 158-174) Agent Smith continued to observe DiMaio after the third race (the one on which Kubesh won) but didn't see "anything unusual happening". (Tr. 161)

There was thus absolutely no corroboration or support for Brochu's testimony, either oral or documentary.

The District Court committed two rather glaring legal errors in allowing Brochu's testimony. It knowingly and intentionally allowed in not only prior but subsequent allegedly similar events that Brochu related. (A-48) When defense counsel objected, citing a lack of legal authority, he was brushed aside with the District Court's "I don't think I need to do legal research on this".

A second glaring legal error by the District Court was its position that prior and subsequent similar acts should be allowed in unless their effect was "inflammatory" on a jury. (A-57) There is no authority for any such judicial test. In the federal courts where probably most crimes are not of a violent or passionate nature (e.g., tax evasion, counterfeiting, etc.) this test would let in all other-similar-crimes evidence.

The newly enacted Federal Rules of Evidence were applicable to the instant case. The Advisory Committee notes on Rule 404(b), pertaining to the admissibility of evidence of other crimes, wrongs, or acts, indicate that on this matter it "is not intended to confer any arbitrary discretion on the trial judge". 4 U.S. Code Congressional and Administrative News, 93rd Cong., 2d Sess. (1974) 7051,7071.

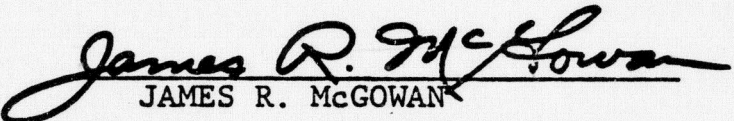
#### Conclusion

The Court of Appeals should reverse DiMaio's conviction and order the District Court to enter a judgment of acquittal; alternatively, it should reverse DiMaio's conviction and order a new trial, preferably before a



different trial judge.

Respectfully submitted,

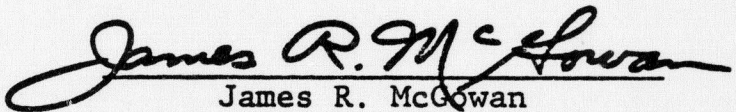
  
JAMES R. MCGOWAN

Counsel for the Defendant

Certificate of Service

I hereby certify that service of the within  
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to its counsel, postage prepaid, properly addressed to:

Michael Hartmere, Esq.  
Asst. U.S. Attorney  
270 Orange Street, Room 310  
P.O. Box 1824  
New Haven, Connecticut 06510

  
James R. McGowan